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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 791.

RONALD L. CRANE,
Petitioner,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

QUESTIONS PRESENTED.

This case does not present a federal question of substance because the Supreme Court of Iowa followed the prior applicable decisions of this Court. The prior holdings of this Court, to the effect that the defense of contributory negligence is available in an action brought by a non-employee to recover for injuries alleged to have resulted from a violation of the Federal Safety Appliance Act, have never been modified or overruled.

STATEMENT OF THE CASE.

The respondent disagrees with the following statement contained on page 3 of the Petition:

> "* * * After weighing, the two cars were winched back into the stationary and braked cars with sufficient force to recouple, had the couplers complied with the federal Safety Appliance Act (R. 52-54, 63, 92-98, 136). * * *"

The respondent has asserted at every stage of the proceedings that the evidence, when viewed in the light most favorable to the petitioner, would not warrant a jury in finding that any of the railroad cars involved were not equipped with couplers, coupling automatically by impact as required by Section 2 of Title 45, U. S. C. A. The respondent as Appellee in the Iowa Supreme Court urged that the case should be affirmed by the Supreme Court of Iowa on the non-federal ground that its Motion for Directed Verdict should have been sustained because the plaintiff failed to establish that the railroad cars were not equipped with couplers of the kind required by the Federal Safety Appliance Act. This point was argued at length at pages 100 to 126 of Appellee's Brief.

Respondent made a Motion for Directed Verdict at the close of plaintiff's case in the District Court of Iowa, asking that the jury be instructed to return a verdict for the defendant on this ground (R. p. 173, ll. 9 to 29). It was renewed at the close of all the evidence. The District Court instructed the jury that, to establish a violation of the coupler statute, the plaintiff was required to establish that the couplers on the car were set at a proper position to couple at the time of impact, and at the time the couplers were brought together the impact was equal to or greater than the impact normally employed by the railroad in coupling cars (R. p. 263, ll. 9 to 34). No exception was taken to this instruction

other than that the plaintiff contended that a violation of the Safety Appliance Act resulted in absolute liability (R. p. 259, ll. 10 to 22).

The evidence showed that, as a matter of law, the highest speed that could be attained by means of using the winch was a speed of less than one-half mile per hour (R. p. 222, l. 30 to p. 223, l. 3). The usual and ordinary rate of speed employed by railroads in coupling cars was from two to four miles an hour. If couplings were attempted at a lower speed, the chances of effecting a coupling would be less (R. p. 191, l. 1 to p. 192, l. 3). The record shows without dispute that the attempt to recouple the cars took place while they were located on the curve shown in the photograph which was introduced in evidence as Plaintiff's Exhibit 2, and that the inside of the curve of this track was located on the same side of the track as the winch which was used to move the railroad cars, while the outside of the curve would be on the side of the track where the meal house was located (R. p. 201, l. 32, to p. 202, l. 11) (R. p. 80, l. 17, to p. 84, l. 27). The evidence was likewise without dispute that, when making a coupling upon a curve such as is shown in Exhibit 2, the usual and ordinary way of doing this is to have the knuckle that opens towards the outside of the curve open, and the one that opens towards the inside of the curve closed (R. p. 201, l. 32, to p. 202, l. 26).

Respondent contended in the Court below that there was no evidence which would permit the jury to find that at the time of the attempted recoupling the knuckle that opens towards the outside of the curve was open, and the one that opens towards the inside of the curve was closed, which was essential to establish that the couplers on the cars were set in a proper position to couple, as was required by Instruction No. 8 given by the trial court (R. p. 254, l. 22, to p. 255, l. 8).

REASONS TO DENY WRIT.

This case does not present an important federal question. The opinion of the Supreme Court of Iowa, which is sought to be reviewed, is reported as Crane v. Cedar Rapids and Iowa City Railway Company, in 160 N. W. 2d 838. It has not yet been officially reported in the Iowa Reports. This opinion is also set forth in full at pages 4 (a) to 18 (a) of Appendix B in the Petition for Writ of Certiorari.

The Iowa Court concluded that the Federal Safety Appliance Acts, while prescribing absolute duties, did not attempt to lay down rules governing actions for enforcing these rights. The Court likewise held that the Safety Appliance Acts did not affect the defense of contributory negligence when an action was brought by a non-employee to recover for injuries based upon an alleged violation of the Federal Safety Appliance Acts. The Court held that in a case such as this the injured party was required to exercise due care for his own safety and under Iowa law his contributory negligence was a proper defense to be submitted to the jury. The Court held that the instructions in this regard were correct.

In support of this conclusion the Iowa Court, at pages 841 to 842 of 160 N. W. 2d, cites and quotes at length from the following cases decided by this Court in support of the holding that contributory negligence was a proper defense to be submitted to the jury.

Schlemmer v. Buffalo R. & P. Ry. Co., 220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596 (1910);

Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1933);

Moore v. Chesapeake & Ohio Ry. Co., 291 U. S. 205, 216, 54 S. Ct. 402, 78 L. Ed. 755 (1933);

Gilvary v. Cuyahoga Valley Ry. Co., 292 U. S. 57, 61, 54 S. Ct. 573, 78 L. Ed 1123 (1933);

Tipton v. Atchison, Topeka and Santa Fe Ry. Co., 298 U. S. 141, 146, 56 S. Ct. 715, 80 L. Ed. 1091 (1935).

The Court likewise pointed out that other Federal Courts had consistently held that contributory negligence was available as a defense in Federal Safety Appliance cases if the state law so provided. For this conclusion the following cases were cited:

Hartley v. Baltimore & O. R. Co., 3 Cir., 194 F. 2d 560, 563 (1952);

Jacobson v. New York, N. H. & H. R. Co., 1 Cir., 206 F. 2d 153, 157 (1953);

Hunter v. Missouri-Kansas-Texas Railroad Company, 276 F. Supp. 936, 943, D. C. Oklahoma (1967).

The petitioner has been unable to demonstrate that any of these various holdings have been overruled or modified by this Court.

The Iowa Court then gave consideration to the same cases upon which the petitioner now relies. At page 842 of the opinion it refers to these as "cases which the plaintiff claims show an inclination on the part of the Court to treat absolute duty and absolute liability the same." The Court, after analyzing these cases, points out that the issue of contributory negligence was not mentioned in any of these cases, most of which were cases which arose under the Federal Employers' Liability Act. The Iowa Court, at page 843 of the opinion, then commented as follows:

> "* * * The Federal statutes have not been changed. The reasons for holding a non-employee's action is governed by applicable state law seem sound and still exist. In any event, we do not consider it our prerogative to place an interpretation on the federal statutes which differs from that of the U. S. Supreme Court. No one claims contributory negligence is not a defense under Iowa law."

The argument is made, commencing at page 11 of the Petition, to the effect that, if Crane has been an employee of the railroad, contributory negligence would not have barred his recovery for breach of the Safety Act if he had pursued his rights under the Federal Employers' Liability Act, 45 U. S. C. A., Section 53. This argument, of course, must be conceded, but the section to which reference is made is restricted to actions brought against the common carrier by an employee, and specifically provides "that no such employees who may be injured * * * shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The petitioner now argues at page 12 that, although Crane at the time of his injury was not employed by the railroad, he should, nevertheless, be given the same protection which is accorded only to railroad employees under the Federal Employers' Liability Act (45 U. S. C. A., Section 53).

The petitioner at the time of his injury was not performing any business for the respondent railroad. The work in which he was engaged was entirely in the furtherance of his employment by Cargill, Inc. There is no absurdity in making such a distinction between railroad employees and non-employees where an action is brought to recover for injuries because of an alleged violation of the Safety Appliance Acts. If Congress had intended a different result, it would not have used language which abrogated the defense of contributory negligence in only those cases where a railroad employee was injured or killed. Such is the limitation contained in 45 U. S. C. A., Section 53.

No case has been decided by any Court which will support the contention that it was the intent of Congress that no distinction should be made between railroad em-

ployees and non-railroad employees in actions brought to recover for personal injuries based upon a violation of the Federal Safety Appliance Acts. The petitioner overlooks the prior holdings of this Court, which have recognized that the Federal Safety Appliance Acts unlike the Federal Employers' Liability Act, give no right of action as such for their violation, but leave the remedy to the law of the state where the injury may occur. As a consequence, the issue of whether contributory negligence is available as a defense must be determined in accordance with applicable state law. There is no misinterpretation by the Iowa Court of the decisions of this Court construing either the Safety Appliance Acts or the Federal Employers' Liability Act.

It is a well settled rule of Iowa law that the respondent, having obtained a verdict from the jury, had the right to defend that verdict upon appeal to the Iowa Supreme Court upon all grounds upon which it might have demanded a directed verdict. If the respondent were entitled to a directed verdict in the trial court, the error, if any, concerning the issue of petitioner's contributory negligence would be non-prejudicial.

Mulroney Mfg. Co. v. Weeks, 185 Iowa 714, 717, 171 N. W. 36 (1919);

Neyens v. Gehl, 235 Iowa 115, 118, 15 N. W. 2d 888 (1944).

The Supreme Court of Iowa had no occasion to review the evidence from this standpoint because it gave consideration to all the errors which were assigned by the petitioner upon the appeal, and concluded that there was no reversible error in the record. The respondent now asserts that, even if contributory negligence were not a valid defense, the petitioner was nevertheless not entitled to recover for other non-federal reasons. The evidence, when viewed in the light most favorable to the

petitioner, was such that, if the jury had found the railroad cars were not equipped with couplers of the kind required by Section 2 of Title 45, U. S. C. A., such a verdict would not have been supported by any evidence. The Iowa Supreme Court should have affirmed the appeal to that Court on both non-federal as well as federal grounds. There is not one scintilla of evidence which would permit the jury to find that the petitioner at the time of his injury was performing railroad business on respondent's railroad system.

CONCLUSION.

The petitioner tends to confuse and obscure the clear holding of the Iowa Supreme Court. He cannot point to a single case decided by any Court which supports his contention that contributory negligence is not a proper defense when the action is brought by a non-employee to recover for injuries which were alleged to result from a violation of the Federal Safety Appliance Acts.

Respectfully submitted,

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